BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLENDA S. TAYLOR	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,019,628
AEROFLEX	)	
Respondent	)	
AND	)	
	)	
PENNSYLVANIA MANUFACTURERS ASSOCIATION	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the February 13, 2008, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on May 16, 2008, in Wichita, Kansas.

APPEARANCES

Charles W. Hess of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a November 24, 2003, accident. In the February 13, 2008, Award, Judge Barnes determined claimant sustained an eight percent whole person functional impairment after averaging the functional impairment opinions of Dr. Paul S. Stein, Dr. Pat Do, and Dr. Pedro A. Murati. Furthermore, the Judge determined claimant

was entitled to receive benefits for a work disability.[1] The Judge imputed a post-injury wage of $280 per week for the permanent disability formula in K.S.A. 44-510e after finding claimant failed to make a good faith effort to search for employment after being terminated by respondent. And after averaging claimant's wage losses with her task loss, the Judge awarded claimant a 57 percent permanent partial disability followed by a 61 percent permanent partial disability.

While discussing claimant's permanent disability, the Judge specifically noted respondent's argument that claimant was terminated by respondent for cause and, therefore, she should not receive a work disability. The Judge stated:

> In making the above finding, the court has not overlooked respondent's argument that claimant was terminated for cause. The evidence indicates that claimant was terminated for exceeding the allowed number of hours of FMLA [Family Medical Leave Act] leave. Claimant used her FMLA leave for work-related and non-work[-]related medical conditions. In fact, respondent terminated claimant when she was away from work due to a bladder infection, surgery and recuperation.
>
> The court is persuaded that claimant made a good faith effort to retain her employment with respondent. Being absent from work due to an infection, surgery and recovery from surgery is not a demonstration of lack of good faith. The court concludes that claimant was not terminated for good cause, and she is entitled to work disability benefits.[2]

Respondent contends Judge Barnes erred. Respondent notes in its brief that the issue is specifically whether claimant's termination for exceeding her FMLA leave constitutes a lack of good faith effort to retain employment such that her permanent disability benefits should be limited to her functional impairment.

Respondent contends claimant used FMLA leave for both work-related and non-work-related conditions and that she put herself in a position in which she exceeded her FMLA leave and her job was no longer protected under the FMLA. Therefore, respondent argues claimant's actions regarding her use of FMLA leave constitute a voluntary termination from her employment. Respondent argues that in essence claimant constructively refused to work when she used FMLA leave for her work-related injury and that claimant's inability to work was not due to that injury.

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[1] A permanent partial disability under K.S.A. 44-510e that is greater than the functional impairment rating.

[2] ALJ Order (Feb. 13, 2008) at 5.

Respondent argues claimant failed to prove she made a good faith effort to retain her employment with respondent; but for claimant's so-called voluntary termination of her employment, claimant would continue to be employed by respondent at a wage comparable to her pre-injury wage in an accommodated position within her permanent work restrictions. Respondent requests the Board to limit claimant's permanent disability benefits to her whole person functional impairment rating.

Conversely, claimant contends she made a good faith effort to retain her employment with respondent. Claimant argues that she tried to perform her job duties despite the fact they violated her permanent work restrictions and that when she requested a change in her duties because of significant difficulty in performing them, no change was offered. Claimant argues there is no evidence that she failed to perform a job within her medical restrictions or refused, actually or constructively, to do so.

Claimant also argues the principles set forth in *Foulk*[3] do not apply in this instance as those principles are not applicable where the accommodated job violates the worker's medical restrictions or where the worker is fired after making a good faith effort to attempt to perform the work but experiences increased symptoms. Moreover, claimant submits that the Board should find K.S.A. 44-510e does not require an injured worker to establish a good faith effort to find work and find that claimant has a 100 percent wage loss.

Claimant requests the Board to find she has an 81.5 percent work disability based upon a 100 percent wage loss and a 63 percent task loss. In the alternative, claimant requests the Board to affirm the February 13, 2008, Award.

The only issues before the Board on this appeal are:

1. Did claimant's termination constitute either a refusal to work or a failure to make a good faith effort to retain her employment?

2. If claimant has a work disability, what is the wage loss and task loss for the permanent partial disability formula of K.S.A. 44-510e?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

Respondent employed claimant as an assembler, which required claimant to examine computer parts under a microscope. Before being terminated in July 2006, claimant worked for respondent for almost 20 years.

Over a period of time claimant developed pain in her neck and shoulders along with numbness in her hands and arms. In late October 2003, respondent referred claimant to the company doctor for the start of her medical treatment. And in early December 2003, claimant began treating with Dr. Paul S. Stein, who saw claimant approximately six times from December 8, 2003, through March 2, 2005, when he released her from treatment.

Because of her repetitive trauma injuries, claimant was off work from November 7, 2003, through July 18, 2004, and again from July 20, 2004, through the latter part of October 2004.[4] When claimant returned to work for respondent in October 2004, respondent attempted to provide claimant with work to accommodate her neck and bilateral upper extremity problems. Claimant's symptoms continued and she attempted to work only part-time upon the advice of her personal physician. But in January 2005, Dr. Stein felt that claimant could work eight hours a day as long as she followed the work restrictions he recommended – avoid repetitive activity with the hands and fingers, avoid repetitively bending or twisting the neck, avoid continuously flexing the neck and upper back, and keeping her arms in front of her body.[5]

In October 2005 claimant applied for leave under FMLA (Family Medical Leave Act), which she used for both her occupational injuries and non-occupational health problems. Despite her ongoing symptoms, claimant continued working for respondent until June 25, 2006, when she went to a hospital emergency room for a bladder problem. In early July 2006 claimant underwent bladder surgery. While claimant was recuperating from surgery, respondent terminated her employment because she had exhausted her FMLA leave.

When claimant testified in November 2007, she was unemployed and had not worked for another employer since leaving respondent's employ.

For purposes of determining claimant's workers compensation benefits, the parties agreed November 24, 2003, should be the date of accident for the repetitive trauma injuries claimant sustained while working for respondent.

Dr. Stein felt claimant had aggravated degenerative changes in her cervical spine and he suspected a mild element of carpal tunnel entrapment in claimant's right arm.

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[4] Claimant testified she returned to work for respondent in August 2004, but respondent's records indicate she actually returned in October of that year.

[5] Stein Depo. at 10.

Dr. Stein found claimant had a five percent whole person functional impairment under the AMA *Guides*.[6] Claimant's medical expert, Dr. Pedro A. Murati, diagnosed myofascial pain syndrome that affected both shoulders and the cervical spine and probable bilateral carpal tunnel syndrome that was referring pain to both shoulders. Dr. Murati determined claimant had a 14 percent whole person functional impairment under the AMA *Guides*. And Dr. Pat Do, who evaluated claimant at Judge Barnes' request, diagnosed myofascial pain syndrome affecting claimant's neck and shoulder girdles and degenerative changes in her cervical spine. Dr. Do felt claimant had a five percent whole person impairment under the AMA *Guides*.

The Board affirms the Judge's finding that claimant has sustained an eight percent whole person functional impairment for the injuries and symptoms she now has in and around her neck and upper extremities due to the repetitive trauma she sustained while working for respondent.

1. Did claimant's termination constitute either a refusal to work or a failure to make a good faith effort to retain her employment?

Respondent contends it terminated claimant for cause and, therefore, her permanent disability benefits under K.S.A. 44-510e should be limited to her functional impairment rating. Respondent argues claimant unwisely used her FMLA leave for problems she was having with her work-related injuries and, thus, that leave was unavailable when she needed it after her bladder surgery. Accordingly, respondent argues claimant failed to make a good faith effort to retain her employment with respondent. Conversely, claimant counters that she used her FMLA leave in an attempt to preserve her job and, therefore, she made a good faith effort to retain her employment with respondent.

Besides her bilateral upper extremity symptoms, claimant's injuries include the neck. Consequently, claimant's injuries are outside the schedule of K.S.A. 44-510d, which places claimant's injuries and resulting disability within the ambit of K.S.A. 44-510e. The latter statute provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the**

[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

> **accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[7] and *Copeland*.[8] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual wages being received when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[9]

After returning to work following an injury, a worker must also make a good faith effort to retain that employment or a wage will be imputed for purposes of the permanent partial disability formula.

The issue is not whether respondent had a reason to terminate claimant but whether claimant failed to act in good faith as in *Ramirez*.[10] If not, the issue becomes whether

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[7] *Foulk*, *supra*.

[8] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[9] *Id.* at 320.

[10] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

claimant made a good faith effort to retain and obtain employment when considering all the facts and circumstances. And the reason for a worker being terminated is only one of the factors to be considered.[11] Good faith is a question of fact to be determined on a case-by-case basis after carefully examining all the facts and circumstances. In short, injured workers who are terminated for reasons other than their injuries are not necessarily precluded from receiving an award of permanent disability benefits for a work disability.

Judge Barnes found "[b]eing absent from work due to an infection, surgery and recovery from surgery is not a demonstration of lack of good faith."[12] The Board agrees and it would be hard-pressed to find that claimant's use of FMLA leave, which claimant utilized trying to preserve her job, demonstrated a refusal to work or the lack of a good faith effort to retain her employment with respondent. There is no argument that claimant did not have the right to use her FMLA leave in the manner she did. Indeed, respondent knew claimant was using that leave because of the continuing symptoms she was having due to her repetitive trauma injuries. This is definitely not a case where claimant was terminated for misconduct.[13] And later, Dr. Stein confirmed that it was questionable whether the work respondent assigned claimant after her return to work in October 2004 was appropriate.

Claimant's ability to work has been significantly compromised by her injuries. She is now unemployed and competing for jobs in the open labor market saddled with work restrictions and physical limitations. The basic premise of the Workers Compensation Act is to place the burden of industrial injuries upon industry. There is no provision in the Act that an employer's good faith or good intentions should limit a worker's permanent disability benefits to the worker's functional impairment rating. Conversely, the common thread in the appellate court cases that have limited the permanent disability to the functional impairment rating is the lack of a good faith effort to obtain or retain employment, including the commission of some wrongful act.[14]

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[11] See *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999); *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800, *rev. denied* 276 Kan. 967 (2003); *Beltz v. Federal Express*, No. 1,004,852, 2004 WL 1778906 (Kan. WCAB July 27, 2004); *Chavarin v. National Beef Packing Company*, No. 1,012,527, 2005 WL 2181237 (Kan. WCAB Aug. 31, 2005), *aff'd*, No. 95,261 (Kansas Court of Appeals unpublished opinion Aug. 4, 2006), *rev. denied* (2006); *Hurlburt v. T-Mobile USA, Inc.*, No. 1,021,535, 2006 WL 3598275 (Kan. WCAB Nov. 21, 2006), *appeal filed*, No. 97,779 (Kansas Court of Appeals).

[12] ALJ Order (Feb. 13, 2008) at 5.

[13] See *Ramirez*, *supra*.

[14] See *Foulk*, *supra*; *Copeland*, *supra*; *Ramirez*, *supra*; *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* 282 Kan. ___ (2006).

The Board finds claimant is unable to continue working for respondent for reasons other than lack of a good faith effort. The situation is analogous to those claims in which an injured worker is laid off following an occupational injury. And in those situations, despite the good faith of the employer, the injured worker is entitled to receive a work disability, assuming the wage loss is greater than 10 percent.[15] Accordingly, claimant is entitled to receive permanent disability benefits based upon her task loss and wage loss.

2. What is the wage loss and task loss for the permanent partial disability formula of K.S.A. 44-510e?

The Board affirms Judge Barnes' finding that claimant has failed to prove she made a good faith effort to find other employment since being terminated by respondent. Claimant was terminated in July 2006 and was still unemployed in November 2007, when she last testified. The Board is not persuaded by either claimant's testimony or her partially completed job search logs she presented that she had exerted a good faith effort to find other employment.

Because claimant has failed to satisfy her burden of proving that she has made a good faith job search, the Board must impute a post-injury wage for purposes of the wage loss prong of the permanent partial disability formula. Jerry D. Hardin was the only expert witness to provide an opinion of claimant's retained ability to earn wages. Accordingly, the Board adopts that opinion and finds claimant retains the ability to earn $280 per week. Consequently, the Board finds claimant has proven no wage loss through July 23, 2006, which is the approximate date she was terminated by respondent, followed by a 51 percent wage loss ($280 compared to $573.62) for the period from July 24, 2006, through July 31, 2006, followed by a 59 percent wage loss ($280 compared to $691.34).

Likewise, the Board affirms the Judge's finding that claimant sustained a 63 percent task loss, which was the task loss opinion of both Dr. Stein and Dr. Murati. Averaging that task loss with claimant's wage losses yields a permanent disability of 57 percent and 61 percent, respectively.

Claimant argues that the Board should not apply a good faith test when applying the permanent disability formula of K.S.A. 44-510e. Assuredly, the concepts of good faith and imputing wages are neither mentioned in that statute or any other part of the Workers Compensation Act. But the Kansas Court of Appeals has added that benchmark as a requirement before a worker's actual post-injury wage may be used in the permanent

[15] *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005); *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998); *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

disability formula.[16] It is not for the Board to substitute its judgment for that of the appellate courts. Accordingly, the Board will apply the principles of *Foulk* and *Copeland* until those decisions are altered.

Consequently, the February 13, 2008, Award should be affirmed. The Board adopts the findings and conclusions set forth by Judge Barnes in the Award to the extent they are not inconsistent with the findings above.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and the issues presented in this appeal.[17] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the February 13, 2008, Award entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of June, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[16] See *Foulk*, *supra*, and *Copeland*, *supra*.

[17] K.S.A. 2007 Supp. 44-555c(k).